IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DOUGLAS P. WILBERGER, Plaintiff, v. LLOYD R. JOSEPH, ROY OTLOWSKI, MAGISTRATE JUDGE NELSON, JANE BRADY, and EDMUND HILLIS, Defendants.	)	Civil Action No. 03-631-SLR

MEMORANDUM ORDER

The plaintiff, Douglas P. Wilberger, #304-094, is a pro se litigant who is presently incarcerated at the Lorain Correctional Institution located in Grafton, Ohio. At the time he filed this complaint he was incarcerated at the Multi-Purpose Criminal Justice Facility located in Wilmington, Delaware. He filed this action pursuant to 42 U.S.C. § 1983 and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. STANDARD OF REVIEW

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. When reviewing pauper application, the court must make two separate determinations. First, the court must determine whether the plaintiff is eligible for pauper status pursuant to 28 U.S.C. § 1915. On October 6, 2003, the court granted plaintiff's request to proceed in forma pauperis and ordered him to file an authorization form within thirty days or

the case would be dismissed.[1] Plaintiff filed the authorization form on November 6, 2003.

Second, the court must "screen" the complaint to determine whether it is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant immune from such relief pursuant to 28 U.S.C. § 1915(e)(2)(B). The United States Supreme Court has held that 28 U.S.C. § 1915(e)(2)(B)'s term "frivolous" when applied to a complaint, "embraces not only the inarguable legal conclusion, but also the fanciful factual allegation," such that a claim is frivolous within the meaning of § 1915(e)(2)(B) if it "lacks an arguable basis either in law or in fact," Neitzke v. Williams, 490 U.S. 319, 325 (1989).[2]

When reviewing complaints pursuant to 28 U.S.C. § 1915(e)(2)(B), the court must apply the standard of review set forth in Fed. R. Civ. P. 12(b)(6). Neal v. Pennsylvania Bd. of Prob. & Parole, No. 96-7923, 1997 WL 338838 (E.D. Pa. June 19,

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[1] On July 21, 2003, the court ordered plaintiff to file a certified copy of his prison trust account statement within thirty days or the complaint would be dismissed. On September 12, 2003, the court dismissed the complaint because plaintiff failed to file a certified copy of his prison trust account statement as ordered. On October 6, 2003, the court granted plaintiff's motion for reconsideration and reopened the case.

[2] Neitzke applied § 1915(d) prior to the enactment of the Prisoner Litigation Reform Act ("PLRA"). Section 1915 (e)(2)(B) is the re-designation of the former § 1915(d) under the PLRA. Therefore, cases addressing the meaning of frivolous under the prior section remain applicable. See § 804 of the PLRA, Pub.L.No. 14-134, 110 Stat. 1321 (April 26, 1996).

1997)(applying Rule 12(b)(6) standard as appropriate standard for dismissing claim under § 1915A). Under this standard, the court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

As discussed below, plaintiff's § 1983 claims against defendants, Roy Otlowski, Magistrate Judge Nelson, Jane Brady, and Edmund Hillis have no arguable basis in law or in fact and shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1). However, plaintiff's claim against defendant Lloyd R. Joseph is not frivolous within the meaning of 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1) and an appropriate order shall be entered.

II. DISCUSSION

A. The Complaint

1. The Amendments

Plaintiff filed the complaint on July 9, 2003, and initially named Lloyd R. Joseph and Roy Otlowski as the defendants. (D.I.

2) On August 8, 2003, plaintiff filed the amended complaint also naming Magistrate Judge Nelson as a defendant. (D.I. 8) On November 7, 2003, plaintiff filed a motion to amend the complaint, again requesting leave to add Magistrate Judge Nelson as a defendant, as well as Attorney General Jane Brady and Edmund Hillis. (D.I. 16) Plaintiff also expands his allegations against defendants Joseph and Nelson.

"After amending once or after an answer has been filed, the plaintiff may amend only with leave of the court or the written consent of the opposing party, but 'leave shall be freely given when justice so requires.'" Shane v. Fauver, 23 F.3d 113, 115 (3d Cir.2000) (quoting Fed. R. Civ. P. 15(a)). The court shall grant plaintiff's motion and will consider plaintiff's allegations when making its decision in this matter.

2. The Allegations

Plaintiff alleges that defendant Lloyd R. Joseph ("Joseph"), a New Castle County Police Officer, detained him on May 8, 2003. Plaintiff further alleges that Joseph illegally charged him on May 9, 2003 with possession of a firearm by a person prohibited. Plaintiff alleges that the gun was in the trunk of Jason McKinley's car, and was not in plaintiff's possession. (D.I. 2 at 2) Plaintiff also alleges that defendant Roy Otlowski ("Otlowski"), his court appointed defense counsel, failed to provide him effective assistance of counsel. (Id. at 3)

On August 8, 2003, plaintiff filed a motion to amend complaint, requesting leave to add defendants Magistrate Judge Nelson ("Nelson") and Attorney General Jane Brady ("Brady"), which the court construed as the amended complaint. (D.I. 8) In the amended complaint, plaintiff alleges that Joseph lied in his affidavit in order to obtain the search warrant. Plaintiff also alleges that Nelson violated his constitutional rights by issuing the search warrant. (Id. at 4) Plaintiff does not include any allegations regarding Brady. On November 7, 2003, plaintiff filed a motion to amend the complaint requesting leave to add defendant Edmund Hillis ("Hillis") and also requesting that the court review the attached exhibits. (D.I. 16) On December 19, 2003, plaintiff filed a letter motion for appointment of counsel stating that he has been acquitted of all charges in Delaware. (D.I. 22) Plaintiff requests one million dollars in compensatory damages. (D.I. 2 at 4) He also requests immediate release from Delaware custody. (Id.) However, this request is moot as he is now in custody in Ohio. (D.I. 23)

B. Analysis

1. Judicial Immunity

The United States Supreme Court has held that judges are absolutely immune from suits for monetary damages and such immunity cannot be overcome by allegations of bad faith or malice. Mireles v. Waco, 502 U.S. 9, 11 (1991). Furthermore,

judicial immunity can only be overcome if the judge has acted outside the scope of his judicial capacity or in the "complete absence of all jurisdiction." Id. at 11-12. Here, plaintiff alleges that Nelson violated his constitutional rights by issuing a search warrant while acting within the scope of his judicial capacity. Consequently, Nelson is immune from suit for monetary liability under 42 U.S.C. § 1983. Plaintiff's claim against Nelson lacks an arguable basis in law or in fact. Therefore, the court finds that plaintiff's claim against Nelson is frivolous within the meaning of 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

2. Absolute Immunity

Section 1983 requires the plaintiff to show that the person who deprived him of a constitutional right was "acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988) (citing Parratt v. Taylor, 451 U.S. 527, 535 (1981))(overruled in part on other grounds Daniels v. Williams, 474 U.S. 327, 330-31 (1986)). Public defenders do not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in criminal proceedings. Polk County v. Dodson, 454 U.S. 312 (1981). Furthermore, public defenders are entitled to absolute immunity from civil liability under 42 U.S.C. § 1983. Black v. Bayer, 672 F.2d 309 (3d Cir. 1982).

Because Otlowski and Hillis have not acted under color of

state law and are immune from liability under 42 U.S.C. § 1983, plaintiff's claim against them lacks an arguable basis in law or in fact. Therefore, the court finds that plaintiff's claim against Otlowski and Hillis is frivolous within the meaning of 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

3. Vicarious Liability

Plaintiff raises no allegations against Brady. He merely asserts that Brady is the Attorney General for the State of Delaware. (D.I. 8) It appears that plaintiff is attempting to hold Brady liable for Joseph's actions because she is the Attorney General for the State of Delaware. (Id.) Even if plaintiff's assertion that Brady has supervisory authority over Joseph was correct, his claim against Brady would fail. Supervisory liability cannot be imposed under § 1983 on a respondeat superior theory. See Monell v. Dep't of Social Services of City of New York, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). In order for a supervisory public official to be held liable for a subordinate's constitutional tort, the official must either be the "moving force [behind] the constitutional violation" or exhibit "deliberate indifference to the plight of the person deprived." Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989)(citing City of Canton v. Harris, 489 U.S. 378, 389 (1989)). Here, plaintiff merely implies that this defendant is liable because of her supervisory position. (D.I. 8

at 1)

Nothing in the complaint indicates that Brady was the "driving force [behind]" defendant Joseph's actions, or that she was aware of plaintiff's allegations regarding Joseph and remained "deliberately indifferent" to his plight. Sample v. Diecks, 885 F.2d at 1118. Consequently, to the extent that plaintiff is alleging Brady is vicariously liable for defendant Joseph's constitutional tort, his claim has no arguable basis in law or in fact. Therefore, plaintiff's vicarious liability claim against Brady is frivolous and shall be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

5. Malicious Prosecution

Plaintiff alleges that Joseph lied in the affidavit used to obtain the search warrant leading to his arrest. (D.I. 2, 8, 16) Plaintiff further alleges that he has been acquitted of all charges. (D.I. 22) Consequently, plaintiff's malicious prosecution claim is not frivolous within the meaning of 28 U.S.C. §§ 1915(e)(2)(B)-1915(A)(b)(1). An appropriate order shall be entered.

C. The Motion for Appointment of Counsel

Plaintiff alleges that the defendants have violated his constitutional rights by depriving him of effective assistance of counsel and subjecting him to malicious prosecution. Plaintiff asserts that he requires assistance of counsel in this case

because he has been acquitted of the charges in Delaware and transferred to a prison in Ohio. (D.I. 22)

Plaintiff, a pro se litigant proceeding in forma pauperis, has no constitutional or statutory right to appointed counsel. See Ray Robinson, 640 F.2d 474, 477 (3d Cir. 1981). It is within this court's discretion, however, to seek representation by counsel for plaintiff, but this effort is made only "upon a showing of special circumstances indicating the likelihood of substantial prejudice to [plaintiff] resulting from [plaintiff's] probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case." Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984); accord Tabron v. Grace, 6 F.3d 147, 155 (3d Cir. 1993)(representation by counsel may be appropriate under certain circumstances, after a finding that a plaintiff's claim has arguable merit in fact and law). Having reviewed plaintiff's complaint, the court finds that his allegations are not of such a complex nature that representation by counsel is warranted at this time. The various papers and pleadings submitted by plaintiff reflect an ability to coherently present his arguments.

NOW THEREFORE, at Wilmington this 27th day of February, 2004, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to amend the complaint (D.I. 16) is GRANTED.

2. Plaintiff's letter motion for appointment of counsel (D.I. 22) is DENIED.

3. Plaintiff's claims against defendants Nelson, Otlowski, Hillis and Brady are DISMISSED as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

IT IS FURTHER ORDERED that:

1. The clerk of the court shall cause a copy of this memorandum order to be mailed to plaintiff.

2. Pursuant to Fed. R. Civ. P. 4(c)(2) and (d)(2), the plaintiff has completed and returned to the Clerk of the Court an **original** "U.S. Marshal-285" form for **each** defendant. The plaintiff **shall** also complete and return to the Clerk of the Court an **original** "U.S. Marshal-285" form for the Chief Executive Officer for New Castle County, 87 Reads Way, NEW CASTLE, DELAWARE, 19720, pursuant to Fed. R. Civ. P. 4(j)(2). **The plaintiff must also provide the Court with one copy of the complaint (D.I. 2), the amended complaint (D.I. 8), and the motion to amend the complaint (D.I. 16), for service upon each defendant. Plaintiff is notified that the United States Marshal will not serve the complaint until all "U.S. Marshal 285" forms with copies of the complaint, have been received by the Clerk of the Court. Failure to so provide a "U.S. Marshal 285" form and a copy of the complaint for each defendant within 120 days of this**

order may result in the complaint being dismissed or defendants being dismissed pursuant to Federal Rule of Civil Procedure 4(m).

3. Upon receipt of the form(s) required by paragraph 2 above, the United States Marshal shall forthwith serve a copy of the complaint (D.I. 2), the amended complaint (D.I. 8), and the motion to amend the complaint (D.I. 16), this order, a "Notice of Lawsuit" form, the filing fee order(s), and a "Return of Waiver" form upon each of the defendants so identified in each 285 form.

4. Within **thirty (30) days** from the date that the "Notice of Lawsuit" and "Return of Waiver" forms are sent, if an executed "Waiver of Service of Summons" form has not been received from a defendant, the United States Marshal shall personally serve said defendant(s) pursuant to Fed. R. Civ. P. 4(c)(2) and said defendant(s) shall be required to bear the cost related to such service, unless good cause is shown for failure to sign and return the waiver.

5. Pursuant to Fed. R. Civ. P. 4(d)(3), a defendant who, before being served with process timely returns a waiver as requested, is required to answer or otherwise respond to the complaint within **sixty (60) days** from the date upon which the complaint, this order, the "Notice of Lawsuit" form, and the "Return of Waiver" form are sent. If a defendant responds by way of a motion, said motion shall be accompanied by a brief or a memorandum of points and authorities and any supporting

affidavits.

6. No communication, including pleadings, briefs, statement of position, etc., will be considered by the Court in this civil action unless the documents reflect proof of service upon the parties or their counsel. The clerk is instructed not to accept any such document unless accompanied by proof of service.

Sue L. Robinson
UNITED STATES DISTRICT JUDGE